



**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

Office of the Inspector General, Petitioner

vs.

DECISION

Case #: FOF - 160653

██████████, Respondent

Pursuant to a petition filed February 14, 2014, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the Office of Inspector General to disqualify Latoya Davis from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on November 4, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Representatives: Nadine Stanke and Nicole Housley

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

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ADMINISTRATIVE LAW JUDGE:

Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Respondent (CARES # ██████████) is a resident of Milwaukee County.
2. On April 17, 2014, the Respondent posted the following message on his Facebook page, "Anyone interestd in buy foodstamp tomro mornin hmu n let me kno n il gve u dtails". (Exhibit 5)
3. On May 15, 2014, the Respondent made two posts on Facebook one stating, "Anyone wana buy 137.00 worth of foodstamps rite now? I got a ride and can meet u sumwhere 2 go shopin or take u shopping lmk asap or cal

or txt me [REDACTED] [REDACTED]' and another stating, "Anyone wana buy 137.00 worth of foodstamps rite now? I got a ride and can meet u sumwhere 2 go shopin or take u shoping lmk asap". (Exhibit 5)

4. On June 13, 2014, the Respondent posted the following message on his Facebook page, "Fstamps 4 sale if neone interestd or want dtails txt me [REDACTED] [REDACTED] or hmu on here" (Exhibit 5)
5. In response to an inquiry about the food stamps, the Respondent posted at 8:08 a.m. on June 13, 2014, "No they werent mine last time lol i was tryn to help a frend plus i had 2b at work so i didn't have time lol. But ths time they r mine. They dnt come on till the 15th but im trying to set sumthng up ahead of time ya kno. Ill go with whoever ya kno but im oly trying to sell 60-80 worth so lmk". (Exhibit 5)
6. On June 16, 2014, the Respondent posted the following message on his Facebook page, "Anyone want buy foodstamps lmk asap". (Exhibit 5)
7. On July 7, 2014, the Respondent posted, "Who want by fstamps?? Will have 190 4 sale wen my card get here. Shud b here no later than sat. Then i get another 190 on 15th ro if u interestd in either or both lmk asap". (Exhibit 5)
8. On July 14, 2014, the Respondent posted, "I got between 120-150 foodstamps 4 sale. If ur interested n serious plz lmk asap so we can set sumthng up 4 tomoro morning as early as possible. Im willing to meet us dpending where n go shoping with u. Serious inquiries only lmao. Hmu on here or 4 best n quikest qesponse txt [REDACTED] [REDACTED] at ur quikest n earliest convienance". (Exhibit 5)
9. On August 8, 2014, the Petitioner posted the following on his Facebook page:

Attention fb friends 2moror I will have 60-80 fstamp 4 sale. Im wilng to go shpng with u so lmk asap if u interested so we can set up a time n wat not but lmk asap. N then on the 15 ill have mre 4 sale. Txt me at [REDACTED] [REDACTED] or u can call me @ [REDACTED] [REDACTED] all of them r my direct numbers so lmk asap first com first serve

(Exhibit 5)

10. Later at 11:37 a.m. on August 8, 2014, the Respondent replied to a comment stating he should get a job, stating, "...3rd there not my stamps to being with I bought a frends card tht sold me all 6 montgs in advance for 150.00 n i dnt need it or all it ths month because me n my girl both get em...." (Exhibit 5)
11. At 11:56 p.m. on August 8, 2014, the Respondent continued the on-line conversation stating, "lk but as ive stated i bought the card to help a frend out n got a good ass deal 4 all 6 months n I dnt need it n am selin another persns card so thy can run there mouths all they want lol as I also sed there jealous thy didnt got it like that lol. N instead of being gredy n stockn my house im tryn sel it 2 people who need it ya kno". (Exhibit 5)
12. On September 23, 2014, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that the Respondent attempted to traffic FoodShare benefits on line between May 15, 2014 and August 8, 2014. (Exhibit 1)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing*

official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence. If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.

Emphasis added

The hearing in this case originally took place on November 4, 2014. The Office of Inspector General advised the Respondent of the day and time of the hearing in an Administrative Disqualification Hearing Notice. (Exhibit 1) At that time, the ALJ was able to reach the Respondent at [REDACTED]. The Respondent asked for a postponement indicating that he needed time to prepare for the hearing. Respondent indicated that his current mailing address was [REDACTED]. The adjournment was granted and the hearing was scheduled for December 2, 2014.

The Division of Hearings and Appeals sent the Respondent a notice, advising him of the new date and time of the hearing. The Office of Inspector General sent [REDACTED] a letter on November 4, 2014, explaining the evidence it had against him, along with copies of the exhibits it intended to use at the hearing. (See Exhibit 14)

On December 2, 2014, the Respondent told Ms. Stankey that he could be reached at [REDACTED]. Two attempts were made to reach the Respondent at that number, but the line was busy. An attempt was made to contact the Respondent at [REDACTED], but the outgoing message indicated that the voicemail box was not set up. An attempt was made to reach the Respondent at [REDACTED], and a message was left for the Respondent, indicating the hearing would proceed in his absence unless he had good cause for his failure to be available for the hearing.

The Respondent called later in the day on December 2, 2014 and indicated that he was waiting by the phone but never received the phone calls. The Respondent again asked for and was given an adjournment. He again indicated that he should be called at the [REDACTED] number for the hearing. On December 2, 2014, the Division of Hearings and Appeals sent the Respondent a notice advising him that the hearing was scheduled for December 29, 2014, at 2:15 p.m. ALJ Ishii sent the Respondent a letter indicating that he would not be granted another adjournment, unless he had verifiable good cause. In addition, ALJ Ishii again sent the Respondent copies of the Exhibits provided by the Office of the Inspector General.

On December 29, 2014, attempts were made to reach the Respondent at [REDACTED] but the call would not go through. An attempt was made to reach the Respondent at [REDACTED], but the out-going message indicated the number was no longer valid; and an attempt was made to reach the Respondent at [REDACTED] but the out-going message indicated that the voice mail box was not set up. Finally, an attempt was made to reach the Respondent at [REDACTED] and a voice mail message was left for the Respondent.

Because the ALJ was not able to reach the Respondent, the hearing was again held in his absence.

On January 1, 2015, at 11:55 a.m., the Respondent left a voice mail message again claiming that he was waiting by his phone, but never received a phone call from the Division of Hearings and Appeals. The Respondent's claim is not credible. If he was, in fact, waiting by his phone on December 29, 2014, one would think he would have called the Division of Hearings and Appeals on that same day to inquire about his hearing, instead of waiting three days to ask about it.

The Respondent has not established good cause for his failure to be available for the hearing on December 29, 2014.

What is an Intentional Program Violation?

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; see also 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

What is the Burden of Proof?

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may be reasonable doubt that the elements have been shown.

The Merits of OIG's Claim

This case deals with an allegation of trafficking. Under 7 CFR §271.2, trafficking means:

- (1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone;
- (2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;
- (3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount;
- (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or
- (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.
- (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

This definition became effective November 19, 2013.¹ The previous definition of trafficking did not include attempted trafficking.

More specifically, OIG alleges that the Respondent attempted to traffic FoodShare benefits, based upon his Facebook posts.

The Federal Registrar addressing the amendment to the trafficking definition indicates that “attempt” consists of the “intent to do an act, an overt action beyond mere preparation, and the failure to complete the act.” Fed. Register Vol. 79, No. 162, pg. 51655² This is consistent with the standards for establishing attempt promulgated by the Wisconsin legislature, the Wisconsin courts and the Federal courts.

Wis. Stats. §939.32(3) states that, “An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.”

¹ <https://www.federalregister.gov/articles/2013/08/21/2013-20245/supplemental-nutrition-assistance-program-trafficking-controls-and-fraud-investigations>

² See <https://www.federalregister.gov/articles/2013/08/21/2013-20245/supplemental-nutrition-assistance-program-trafficking-controls-and-fraud-investigations#h-13>

The Wisconsin Court of Appeals in State v. Henthorn, 281 Wis.2d 526, 518 N.W.2d 544 (Wis. App. 1998) restated the holding by the Wisconsin Supreme Court in Hamiel v. State, 92 Wis.2d 656, 666, 285 N.W.2d, that, “[I]t must ... be shown that: (1) the defendant's actions in furtherance of the crime clearly demonstrate, under the circumstances that he [or she] had the requisite intent to commit the crime ...; and (2) that having formed such intent the defendant had taken sufficient steps in furtherance of the crime so that it was improbable that he [or she] would have voluntarily terminated his [or her] participation in the commission of the crime.”

The Federal Courts have dealt with establishing standards for determining when one has attempted to violate the law, as follows:

“As was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct...Not only does the word ‘attempt’ as used in common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements.” U.S. v. Resendiz-Ponce, 549 U.S.102, 127 S.Ct. 782, 107 (2007)

The Seventh Circuit Court of Appeals³ in U.S. v. Sanchez, 615 F.3d 836, 843 and 844 (7th Cir. 2010) followed this standard, stating that one must not only show an intent to violate the law, but also that the defendant took a substantial step toward completing the crime. The Court of Appeals further stated that, “a substantial step is ‘some overt act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime’....and that it is ‘something more than mere preparation, but less than the last act necessary before the actual commission of the substantive crime’...The line between mere preparation is inherently fact specific; conduct that would appear to mere preparation in one case might qualify as a substantial step in another.”⁴

Between April and August 2014, the Petitioner posted offers to sell food stamps seven times. That clearly establishes an intent to traffic food stamps.

In the posts from August 8, 2014, the Respondent provided three phone numbers where he could be reached to make arrangements to purchase the food stamps and states an amount he wishes to sell. The posts from May 15, 2014 and August 8, 2014, suggests that the potential buyer meet the Respondent so they can shop together. It should be noted that in the posts from August 8, 2014, the Respondent admits purchasing food stamps from a friend and that he got a good deal on six-month’s worth of benefits. These posts show that the Respondent went beyond mere preparation and planning, and actually went to the great length of purchasing food stamps for re-sale. His withdrawal from the offense was highly improbable.

There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977). There is nothing in the record to rebut the presumption that the Respondent intentionally violated the rules of the FoodShare program by trying to buy and sell foodstamps.

The Respondent, in his discussions with OIG, claimed that his Facebook account was hacked. The claim is not credible, given that there were seven posts in four months. In addition, the Respondent was sometimes able to be reached at the phone numbers in the Facebook posts.

³ Wisconsin is in the 7th Federal Judicial Circuit and as such, holdings from the 7th Circuit Court of Appeals are binding.

⁴ The Court of Appeals cited to *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980), *United States v. Rovetuso*, 768 F.2d 809, 821 (7th Cir.1985), *United States v. Barnes*, 230 F.3d 311, 315 (7th Cir.2000) and *United States v. Magana*, 118 F.3d 1173, 1199 (7th Cir.1997).

Based upon the record before me, I find that OIG has established, by clear and convincing evidence, that the Respondent intentionally violated FoodShare program rules by trafficking food stamps, and that this violation was the first such violation committed by the Respondent. Therefore, OIG correctly seeks to disqualify the Respondent from the FoodShare program for one year.

CONCLUSIONS OF LAW

1. The Respondent violated, and intended to violate, the FoodShare program rule prohibiting the buying and selling of foodstamps.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the Respondent.

NOW, THEREFORE, it is

ORDERED

That OIG's determination is sustained, and that OIG may make a finding that the Respondent committed a first IPV of the FoodShare program and disqualify the Respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee, Wisconsin,
this 6th day of January, 2015.

\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Nadine Stankey - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAMail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 6, 2015.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
NadineE.Stankey@wisconsin.gov